82-308

No._____

FILED

AUG 12 1982

ALEXANDER L. STEVAS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

Respondents

and

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM P. QUINN
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106
215-925-8300
Attorney for Petitioner

Of Counsel:
DAVID F. GIRARD-DICARLO
ERIC M. HOCKY
RUBIN, QUINN, MOSS & GIRARD-DICARLO

Date: August 12, 1982

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Is Delpro Company, a company engaged in the repair of rail cars, a "carrier" pursuant to the Railway Labor Act and therefore subject to the jurisdiction of the National Mediation Board?

2. Did the National Mediation Board adequately set forth the basis for its determination of jurisdiction over Delpro Company?

DESIGNATION OF CORPORATE RELATIONSHIPS

Delpro Company, filing this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit as petitioner, states that:

1. This is its original Designation of Corporate Relationships.

2. Trailer Train Company is the parent of Delpro Company.

3. Trailer Train Company is not owned by any parent corporation.

4. Delpro Company does not have an ownership interest in any subsidiaries.

5. The only affiliates of Delpro Company are Hamburg Industries, Inc., Acorn Industries, Inc., and Calpro Company.

6. The shareholders of Trailer Train Company are:

a. The Atchison, Topeka and Santa Fe Railway Company,

b. The Baltimore and Ohio Railroad Company,

c. Boston and Maine Corporation (Robert W. Meserve and Benjamin H. Lacy, Trustees),

d. Burlington Northern Railroad Company,

e. Central of Georgia Railroad Company,

f. The Chesapeake and Ohio Railway Company,

g. Chicago and North Western Transportation Company,

h. Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Richard Ogilvie, Trustee),

i. Chicago, Rock Island and Pacific Railroad Company (William M. Gibbons, Trustee),

j. Consolidated Rail Corporation,

DESIGNATION OF CORPORATE RELATIONSHIPS—*(Continued)*

k. The Denver and Rio Grande Western Railroad Company,

l. Detroit, Toledo and Tronton Railroad Company,

m. Erie Lackawanna Railway Company (Thomas F. Patton and Ralph S. Tyler, Jr., Trustees),

n. Florida East Coast Railway Company,

o. Illinois Central Gulf Railroad Company,

p. The Kansas City Southern Railway Company,

q. Louisville and Nashville Railroad Company,

r. Missouri-Kansas-Texas Railroad Company,

s. Missouri Pacific Railroad Company,

t. Norfolk and Western Railway Company,

u. Reading Company,

v. Richmond, Fredericksburg and Potomac Railroad Company,

w. St. Louis Southwestern Railway Co.,

x. Seaboard Coast Line Railroad Co.,

y. Southern Pacific Transportation Co.,

z. Southern Railway Company,

aa. Toledo, Peoria & Western Railroad Co.,

bb. Union Pacific Railroad Company,

cc. Western Maryland Railway Company, and

dd. The Western Pacific Railroad Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
DESIGNATION OF CORPORATE RELATIONSHIPS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. This Case Presents Important Questions of Federal Law Which Must Be Addressed by this Court in Order to Clarify the Boundary Between the Railway Labor Act and the National Labor Relations Act.	7
II. By determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law Contrary to the Plain Language of the Statute.	10
III. By Determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law in a Manner Which Conflicts with the Legislative History of the Act and with Applicable Decisions of this Court.	11
IV. The Court of Appeals Decided an Important Question of Federal Law Contrary to the Congressional Purpose Discernible from the Face of the Statute.	17

TABLE OF CONTENTS—*(Continued)*

Page

V. The Decision of the National Mediation Board Should Have Been Overruled for Failing to Clearly Set Forth the Grounds for its Departure from Prior Decisions. 20

CONCLUSION 23

APPENDIX A-1

TABLE OF AUTHORITIES

I. *CASES* Page

Andrus v. Glover Construction Co., 446 U.S. 608 (1980) 10

Atchison, Topeka & Santa Fe Railway Co. v. Board of Trade, 412 U.S. 800 (1973) 22

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, *reh. denied*, 394 U.S. 1024 (1969) 19

Brotherhood Railway Carmen v. Delpro Company, D.Del., CA 82-464 4

Consella v. Norfolk & Western Railway Company, 381 F.2d 473 (4th Cir. 1967) 16

Chicago & North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971) . 14

Delpro Company v. Brotherhood Railway Carmen, 519 F. Supp. 842 (D.Del. 1981), *affd.*, 676 F.2d 960 (3rd Cir. 1982) ..... *passim*

Delpro Company v. Brotherhood Railway Carmen, 676 F.2d 960 (3rd Cir. 1982) ..... *passim*

Delpro Company v. National Mediation Board, 509 F. Supp. 468 (D. Del. 1981) 6

Detroit and Toledo Shore Line Railroad Co. v. United Transportation Union, 396 U.S. 142 (1969) 17

Jackson v. Northwest Airlines, Inc., 70 F. Supp. 501 (D. Minn. 1947), *affd. sub nom. Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74 (8th Cir. 1950), *cert. denied sub nom. Jackson v. Northwest Airlines*, 342 U.S. 812 (1951) 8, 18, 20

Matter of White, 2 B.R. 656 (E.D. Mich. 1980) .. 10

I. Cases: *(Continued)* Page

McHenry v. Bond, 668 F.2d 1185 (11th Cir. 1982) 21, 22

Midstate Horticultural Co. v. Pennsylvania Railroad Co., 320 U.S. 356 (1943) 16

Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America, F.2d 217 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964) 8, 17, 18, 19

Pennsylvania Railroad Co. v. Public Utilities Comm., 298 U.S. 170 (1936) 16

Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946) 9

Southern Railway Co. v. Reid, 222 U.S. 424 (1912) 16

Summit Airlines v. Teamsters Union No. 295, 628 F.2d 798 (2d Cir. 1981) 14

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 12

United Shoe Workers of America, AFL-CIO v. Bedell, 506 F.2d 174 (D.C. Cir. 1974) 15

United States v. Baltimore & Ohio Railroad Co., 333 U.S. 169 (1947) 16

United States v. C.I.O., 335 U.S. 106 (1947) 15

United States v. Feaster, 410 F.2d 1354 (5th Cir.), *cert. denied sub nom. Feaster v. United States*, 396 U.S. 962 (1969) 6, 17, 18

United States v. Railway Employees' Dep't. of the A.F. of L., 290 F. 978 (N.D. Ill. 1923) 17

TABLE OF AUTHORITIES—*(Continued)*

Page

United Transportation Union v. Long Island Railroad Company, ____ U.S. ____, 50 L.W. 4315 (1982) 17

Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937) 18

Wirtz v. Local 153, Glass Bottle Blowers Association, 389 U.S. 463 (1968) 7

II. *ADMINISTRATIVE DECISIONS*

American Rail Box Car Company and Trailer Train Company, et al., 347 I.C.C. 842 (1974) 4

Delpro Company, 8 NMB No. 2 (1980) ..... *passim*

Delpro Company, 8 NMB No. 16 (1980) .... *passim*

Delpro Company, 8 NMB No. 54 (1980) .... *passim*

Eastern Aviation Services, Inc., 5 NMB No. 53 (1970) 20, 21

Georgia-Pacific Corp., 220 NLRB 885 (1975) 6

Great Lakes Airlines, Inc., 4 NMB No. 5 (1961) . 20

III. *STATUTES*

Administrative Procedure Act
5 U.S.C. §704 21
5 U.S.C. §706(2)(A) 21

Interstate Commerce Act
49 U.S.C. §1(3) 14

Fair Labor Standards Act,
29 U.S.C. §203(d) 18

Labor Management Relations Act of 1947,
61 Stat. 136 (June 23, 1947) 17

Page

National Industrial Recovery Act,
48 Stat. 195 (June 16, 1933) 13

National Labor Relations Act
29 U.S.C. §158(b)(4) 19
29 U.S.C. §178 19
29 U.S.C. §179 19

Railway Labor Act
45 U.S.C. §151, First ..... *passim*
45 U.S.C. §151(a) 17
45 U.S.C. §152, Fourth 13
45 U.S.C. §153, First 13
45 U.S.C. §156 4
45 U.S.C. §160 19

Revised Interstate Commerce Act
49 U.S.C. §10102(24)(B) 15

Judicial Code and Judiciary
28 U.S.C. §1254(1) 2, 3
28 U.S.C. §1292(a) 6
28 U.S.C. §1331 6
28 U.S.C. §1337 6
28 U.S.C. §2101(c) 3
28 U.S.C. §2201 6

IV. *OTHER MATERIALS* Page

Field Manual of the AAR Interchange Rules (1982) 4

Gorman, *Basic Text On Labor Law* (1976) 19

Railway Labor Act — Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce, 73rd Cong., 2d. Sess. (1934) 14

Page

To Amend the Railway Labor Act — Hearings on S. 3266 Before the Senate Committee on Interstate Commerce, 73rd Cong., 2d. Sess. (1934) 13

67 Cong. Rec. 1175 (1934) 13

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

Respondents

and

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Delpro Company ("Delpro") respectfully requests, pursuant to 28 U.S.C. §1254(1), that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review and to reverse the Judgment of that court, entered April 13, 1982 (rehearing denied May 14, 1982), affirming an order of the United States District Court for the District of Delaware declaring Delpro to be a "carrier" for the purposes of the Railway Labor Act ("RLA"),[1] and, therefore, an employer subject to the RLA.[2]

OPINIONS BELOW

The National Mediation Board ("NMB") Mediator issued an investigative report on September 10, 1980. App. A-15. The NMB issued a Determination of Jurisdiction on October 1, 1980. 8 NMB No. 2 (1980); App. A-21. On October 15, 1980, the NMB denied a Delpro petition for reconsideration. 8 NMB No. 16 (1980); App. A-28. The NMB certified the Brotherhood Railway Carmen ("BRC") on December 17, 1980. 8 NMB No. 54 (1980); App. A-34.

The District Court granted summary judgment in favor of the BRC on August 7, 1981. *Delpro Company v. Brotherhood Railway Carmen*, 519 F. Supp. 842 (D. Del. 1981); App. A-36. On August 28, 1981, the District Court enjoined Delpro to bargain with the BRC. App. A-49. Delpro's motion to stay the injunction pending appeal was denied on September 4, 1981.

---

1. 45 U.S.C. §§151-188.

2. Delpro is the sole party filing this petition. In one of the consolidated cases below John Taylor, Dan Lentz, Dan Miller, Joe Le Conte, Wayne Sigley, Jerry Okad , John Markovitch, Gerald Klidies and E. A. Copeland were defendants along with Delpro in their individual capacities and as representatives of Delpro. Since the only relief granted was against Delpro, the individuals named no longer have an interest in this litigation. None of these individuals participated in the proceeding before the Court of Appeals.

The Court of Appeals for the Third Circuit denied a similar motion to stay the injunction on September 27, 1981. The Court of Appeals issued its decision on April 13, 1982. *Delpro Company v. Brotherhood Railway Carmen*, 676 F.2d 960 (3rd Cir. 1982); App. A-3, A-51. The Court of Appeals denied Delpro's petition for a rehearing en banc on May 14, 1982. App. A-53.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit which Delpro is asking this Court to review was entered April 13, 1982. Delpro timely filed a petition for rehearing en banc on April 27, 1982, which was denied on May 14, 1982. This petition has been filed within the 90 day period following the denial of the petition for rehearing as required by 28 U.S.C. §2101(c). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves an attempt by the NMB to expand the jurisdiction of the RLA to Delpro, a company which is not a railroad and which does not provide transportation services. In the absence of such an expansion, Delpro and its employees would be subject to the National Labor Relations Act (NLRA).[3] The case also involves the definition of "transportation" under the Interstate Commerce Act[4] as it was formulated at the time of passage of the 1934 Amendments to the RLA. App. A-57.

---

3. 29 U.S.C. §§151-188.
4. 49 U.S.C. §§10101-11917.

STATEMENT OF THE CASE

Trailer Train Company ("TTX") operates a pool of rail cars which are made available to common carriers by rail who sign a pooling contract and car contract governing use of the cars. App. A-44. Under these contracts, the carriers may only perform "running repairs."[5] All extensive repair work is the responsibility of TTX. App. A-44.

Neither Delpro nor TTX operates as a common carrier by rail. Neither owns any rail lines. TTX reports to the Interstate Commerce Commission ("ICC") pursuant to a pooling order.[6] However, these reports are for informational purposes only, and the ICC has specifically noted that TTX is not a carrier.[7] App. A-19. At the time of the hearing below, TTX's stock was owned by 29 operating railroads, the trustees of two former operating railroads and one freight forwarding company. App. A-43, A-44.

Delpro Company ("Delpro") is one of four wholly-owned subsidiaries of TTX which performs repair work for TTX.[8] The other three repair subsidiaries are Hamburg Industries, Inc. ("Hamburg"), Calpro Company ("Calpro") and Acorn Industries, Inc. ("Acorn").[9] App.

---

5. "Running repairs" is a term of art referring to those minimal repairs which do not constitute extensive repairs. "Extensive repairs" are defined by the American Association of Railroads ("AAR") in Rule 108 of the *Field Manual of the AAR Interchange Rules* (1982).

6. *American Rail Box Car Company and Trailer Train Company et al.*, 347 ICC 842 (1974).

7. *Id.* at 880-881.

8. Delpro has been closed down indefinitely. Delpro may be reopened in the future if economic conditions permit. BRC has filed an action in Delaware (*Brotherhood Railway Carmen v. Delpro Company*, D. Del. CA 82-464) complaining of violations of the RLA and seeking, *inter alia*, to negotiate a contract and the effects of the closing under §6 of the RLA (45 U.S.C. §156).

9. Hamburg was acquired in 1974. Calpro was organized in 1977, Delpro in 1978 and Acorn in 1979.

A-17. TTX has at various times arranged with 30 independent rail car companies for car repairs. App. A-17. Prior to the acquisition of Hamburg, TTX's car repair requirements were met entirely by arrangements with independent car repair facilities, none of whom was or is a railroad or carrier subject to the Interstate Commerce Act.

The employees of Hamburg and Calpro are represented by the International Brotherhood of Teamsters and the United Steelworkers of America, respectively, and were organized pursuant to NLRA procedures. App.-19. Acorn's employees are not organized, and Delpro's employees were not organized until the events surrounding this controversy. App. A-15, A-19. Of the independent repair companies which performed the work undertaken by Delpro and its sister companies upon their formation, at least six have employees who were organized pursuant to the NLRA. None of such independent companies' employees was organized pursuant to the RLA.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO ("BRC") filed an "Application for Investigation of a Representation Dispute." NMB Mediator Samuel Cognata conducted a "field investigation" at Delpro's facility. App. A-15. On October 1, 1980, the NMB issued a "Determination of Jurisdiction" in which it held that Delpro was a "carrier" within the meaning of the RLA and thus subject to its jurisdiction. App. A-21. With the leave of the NMB, Delpro filed a "Petition for Reconsideration" requesting the NMB to reverse its jurisdictional decision or to order a formal hearing. This petition was denied on October 15, 1980. App. A-28. In accordance with its jurisdictional decision, the NMB proceeded to conduct an election among the employees of Delpro, and on December 17, 1980, BRC was certified as the bargaining representative of the employees. App. A-34.

Between the time of the denial of its petition for reconsideration and the election, Delpro brought suit against the NMB in the United States District Court for the District of Delaware seeking a declatory order that it is not a carrier and asking for appropriate injunctive relief. The court rejected the NMB's contention that it lacked subject matter jurisdiction to review the NMB's determination of jurisdiction, but dismissed the action for failure to join the BRC as a defendant. *Delpro Company v. National Mediation Board*, 509 F. Supp. 468 (D.Del. 1981). Delpro refiled with the district court on March 11, 1981, joining the BRC and the NMB as defendants. The following day the BRC filed a separate district court action to enjoin Delpro from refusing to bargain in good faith. The two actions were consolidated by the court, and on August 7, 1981, it granted summary judgment declaring Delpro to be a "carrier" under the Railway Labor Act.[10] App. A-36. On August 28, 1981, the District Court issued an injunction ordering Delpro to bargain with the BRC. App. A-49. Delpro appealed the decision to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a).[11] On April 13, 1982, the Court of Appeals affirmed the judgment of the District Court even though it found "somewhat plausible" Delpro's contention that its functions were not within the coverage of the RLA and recognized that Delpro's reading of the statute would exempt Delpro from coverage by the RLA. App. A-3. A petition for rehearing en banc was timely filed and was denied on May 14, 1982. App. A.53.

---

10. The District Court had jurisdiction to grant the relief requested in the two actions pursuant to 28 U.S.C. §§1331, 1337 and 2201. Additionally, the District Court properly determined that it had the power to review the NMB's decision concerning its jurisdiction. *United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.), *cert. denied sub nom., Feaster v. United States*, 396 U.S. 962 (1969).

11. Delpro's motions to stay the injunction pending the appeal were denied by the District Court on September 4, 1981, and by the Court of Appeals on September 27, 1981. App. A-6.

REASONS FOR GRANTING THE WRIT

The NMB's determination that Delpro is a "carrier" pursuant to the RLA is an unjustifiable expansion of the jurisdiction of the NMB and of the class of employers covered by the RLA. This expansion is contrary to the plain language and the intent of the Act, as shown by its legislative history[12] and the statutory scheme apparent from the RLA on its face. This petition will demonstrate a clear congressional purpose to limit the RLA's coverage to railroads and subsidiaries of railroads *engaged in transportation and regulated by the Interstate Commerce Act*. Delpro is neither a railroad nor such a subsidiary. In attempting to justify its decision, the NMB found it necessary to depart from its previously announced standards. In doing so, it failed to clearly set forth the basis for this departure. For these reasons, the NMB's determination of jurisdiction should have been reversed.

I. This Case Presents Important Questions of Federal Law Which Must Be Addressed by this Court in Order to Clarify the Boundary Between the Railway Labor Act and the National Labor Relations Act.

This case presents the question of which federal labor statute covers Delpro and its employees. It is clear that the RLA and the NLRA are mutually exclusive in their coverage of employers and employees.[13] Therefore, a decision as to the jurisdiction of one statute necessarily precludes the jurisdiction of the other. In this case, the decision of the Court of Appeals that Delpro is a "carrier" and therefore subject to the RLA has placed the relations between Delpro and its employees under a scheme

---

12. The proper construction of labor legislation often requires consideraton of its legislative history and the intent of Congress. *Wirtz v. Local 153, Glass Bottle Blowers Ass'n.*, 389 U.S. 463 (1968); *Feaster, supra.*

13. The definition of "employer" and "employee" in the NLRA both exclude persons "subject to the Railway Labor Act, as amended from time to time". App. A-56, A-57.

of regulation wholly distinct from the NLRA which regulates the relations between Delpro's sister car repair companies and their employees even though the employees of all those companies perform identical work. The resulting dichotomy is not justified by the RLA or any discernible public policy. Unless reversed, this decision will produce the unfortunate result, anticipated in another case by the United States Circuit Court of Appeals for the Ninth Circuit, that different statutes will govern labor relations involving the same work.[14] In light of the exclusivity of the statutes, this dichotomy is untenable, and is likely to spawn further litigation.

Apart from its effect upon the approximately 500 employees at the NLRA organized plants,[15] this determination has the potential to expand the coverage of the RLA beyond what was intended. Any expansion of the RLA would serve to deprive not only Delpro and other employers, but also employees, of rights to which they would otherwise be entitled under the NLRA.[16] For example, under the RLA the right to self-help (strikes, lock-outs, etc.) is greatly limited. Additionally, there is no procedure for decertification under the RLA. This case offers the Court the opportunity to set forth the proper limits of the NMB's jurisdiction. Without such limits, the NMB will be free to take jurisdiction, as it has done here, over a company which the RLA was never meant to cover. Although the particular considerations as to Delpro's carrier status may be limited to Delpro and the other TTX subsidiaries, the general guidelines

---

14. *Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 324 F.2d 217 (9th Cir. 1963), *cert denied*, 376 U.S. 964 (1964).

15. Hamburg has approximately 280 employees, and Calpro approximately 235 employees.

16. *Pan American, supra* at 222-23; *Jackson v. Northwest Airlines, Inc.*, 270 F. Supp. 501, 505 (D. Minn. 1947), *aff'd sub nom. Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74 (8th Cir. 1950), *cert. denied sub nom. Jackson v. Northwest Airlines, Inc.*, 342 U.S. 812 (1951).

which the NMB has breached are applicable in every case dealing with subsidiaries of carriers. Thus, this decision has the potential to affect a great number of other employees around the country and to present recurring questions of interpretation.

No one contends that Depro is a "carrier" within the meaning of the Interstate Commerce Act and subject to the RLA for that reason. Therefore, in order to be a "carrier" under the RLA, Delpro must meet a two part test.[17] It must first be "owned or controlled" by a "carrier."[18] Secondly, and more importantly, it must meet the "function test", *i.e.*, it must perform "any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ."[19]

Delpro contends that the functions of an employer covered by the RLA are limited to "transportation service" as defined by the Interstate Commerce Act.[20] This Court has never ruled on the scope of this test.[21] A decision on this matter would clarify the jurisdictional boundary established by the RLA and the NLRA, and would provide the guidance necessary to assure that employees performing the same function are subject to the same regulation instead of exposing such employees to two distinctly different regulatory schemes. Also, a decision on this matter would be instructive to the two agen-

---

17. App. A-36, A-56.

18. The courts below determined that Delpro was "owned or controlled" by a carrier. While Delpro does not concede that the courts properly applied this aspect of the statute, that determination is not advanced here as a reason for granting the writ except to the extent discussed in Section V, *supra*.

19. App. A-56.

20. *See* Sections II-IV, *infra*.

21. In *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), the Court expressly did not decide the question of whether similar language in the Railroad Retirement Act was broader than the coverage of the Interstate Commerce Act. *Id.* at 452-53.

cies which administer these acts and would promote uniformity and consistency in their actions.[22] Only through a decision by this Court can future inconsistencies like those which now exist between employees performing *identical* work for *identical* subsidiaries of TTX be avoided. The Court should grant the writ of certiorari requested in order to determine this important federal question as to the discrete coverages afforded by the RLA and the NLRA.

II. By Determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law Contrary to the Plain Language of the Statute.

As noted previously, the RLA sets forth a function test which a subsidiary must meet before it qualifies as a "carrier." Thus, the RLA provides that a "carrier" is a company which performs

> any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . .

45 U.S.C. §151, First; App. A-56. The express mention in a statute of certain items implies, in the absence of contrary legislative intent, the exclusion of other similar items.[23] Thus, for Delpro to qualify as a "carrier," it must perform one of the listed services expressly mentioned.

---

22. In the usual case, the NLRB will refer the question of an employer's carrier status to the NMB. *Georgia-Pacific Corp.*, 220 NLRB 885 (1975). This will often eliminate inconsistencies. However, when called upon to certify Delpro's sister companies, Hamburg and Calpro, the NLRB believed that it was so clear that Hamburg and Calpro were *not* carriers that the question was never referred to NMB.

23. *Matter of White*, 2 B.R. 656, 664 (E.D. Mich. 1980) (expressio unius est exclusio alterius). *See also Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

There has been no contention that Delpro performs any service connected with the "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." Only if Delpro performs a service in connection with the "transportation of property transported by railroad" can it satisfy the function test of 45 U.S.C. §151, First.

The repair and maintenance which Delpro performs do *not* in any manner directly involve any "property transported by railroad." The decisions of the NMB, the District Court and the Court of Appeals all ignore the fact that the plain language of the statute requires that the "carrier" be involved with property either during, or immediately before or after, the time it is transported by a railroad. The list of services in section 151, First, makes it clear that *only* in those limited cases where a subsidiary is involved with "property transported by railroad" can it be considered a carrier. Thus, under the explicit provisions of the statute, Delpro does not fall within the function test and, therefore, cannot be found to be a "carrier."

III. By Determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law in a Manner Which Conflicts with the Legislative History of the Act and with Applicable Decisions of this Court.

The Court of Appeals incorrectly believed that the "evident intent" of the statute was to cover those companies performing the services which Delpro performs. Had the Court examined the statute's legislative history, however, it would have discovered that the draftsman intended to limit the RLA's coverage to subsidiaries of railroads engaged in transportation service within the meaning of the Interstate Commerce Act. Under this Court's decisions, Delpro is plainly not engaged in such service.

The only support which the Court of Appeals gives for its view of the RLA's intent is its conclusory statement that "[i]t is clear that the statute means to extend the definition of 'carrier' past those involved in the transportation of property by railroad to those also involved in the receipt, delivery, elevation, etc. of that property." App. A-12. Delpro agrees with the conclusory statement, but denies that this conclusion may be used to extend the definition of "carrier" to Delpro, a company concededly *not* involved in the actual transportation of property transported by railroad or in any one of the various services specified in this section of the RLA. While the Court of Appeals found Delpro's interpretation of the statute "somewhat plausible," the legislative history and applicable decisions of this Court make it clear that Delpro's interpretation is more than merely plausible, but rather that it is correct.

When a statute is plain and unambiguous, the Court ordinarily need not look to the legislative history of the statute.[24] As was discussed in Section II, *supra*, Delpro believes that 45 U.S.C. §151, First, is clear on its face and that it does not apply to Delpro. Despite this clarity, the Court of Appeals found that there are two plausible interpretations of 45 U.S.C. §151, First. Therefore, it becomes necessary to examine the legislative history of the RLA to determine the correct interpretation, and the legislative history of section 151, First, makes it clear that Delpro's interpretation of the statute is the correct one.

Only those express companies, sleeping car companies and carriers by railroad which were subject to the Interstate Commerce Act were "carriers" under the RLA as it was originally enacted in 1926. App. A-56. Since Delpro is not a a carrier subject to the Interstate Commerce Act, it clearly would not have been subject to the

---

24. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29, (1978).

RLA in 1926. The RLA's definition of "carrier" was broadened to its present scope by the amendments to the Act made in 1934.[25]

Congress asked Joseph Eastman, Federal Coordinator of Transportation, to help develop proposals to amend the RLA. The initial proposal for an amended definition of "carrier" presented by Eastman to the Senate Interstate Commerce Committee included "*any company* operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act . . ."[26] Some Committee members were concerned that the proposed definition, by including everything within the definitions of "railroad" and "transportation," would be too broad. They were looking for a more limited definition of carrier.[27]

Eastman returned at a later date with the proposed definition which was subsequently enacted in all relevant parts.[28] Eastman explained that the definition of "carrier" was limited to carriers and their subsidiaries in order to avoid any conflicts with the National Industrial Recovery Act[29] codes. He additionally explained that the language in the new proposal was "some of the language in the Interstate Commerce Act."[30] Eastman reiterated

---

25. This broadening was not one of the principal amendments to the RLA. The two fundamental changes made in 1934 were the proscription against company unions (45 U.S.C. §152, Fourth) and the provision of a neutral referee on adjustment boards (45 U.S.C. §153, First). 67 Cong. Rec. 1175 (1934).

26. *To Amend the Railway Labor Act-Hearings on S. 3266 before the Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. 1 (1934) (emphasis added).

27. Id. at 11-12.

28. The only change between the definition proposed and the definition enacted was the addition of the parenthetical excluding "trucking service." This change is not relevant to the current controversy.

29. 48 Stat. 195 (June 16, 1933).

30. *To Amend the Railway Labor Act, supra* at 145-46.

this latter point to the House Committee on Interstate Commerce stating:

> One of the most difficult things about this bill is to arrive at a proper definition of the term "carrier" . . . [A] satisfactory compromise would be *to limit the definition* to railroads . . . and the subsidiaries which they control which are engaged in *transportation service recognized by the Interstate Commerce Act.*

Railway Labor Act Amendments — Hearings on H.R. 7650 before the House Comm. on Interstate and Foreign Commerce, 73d Cong. 2d Sess. 17-18 (1934) (emphasis added).

These statements by Mr. Eastman are entitled to a great deal of weight in interpreting the provision he drafted. As this Court has previously noted in connection with the interpretation of the RLA, statements of a drafter are entitled to great weight in the interpretation of the drafted provision.[31] Thus, as the legislative history outlined makes clear, the language which was eventually enacted is the result of a compromise limiting the scope of the initially proposed amendment which had included all that was under the Interstate Commerce Act. The definition that was finally approved and incorporated into the Act was itself taken from the definitions of the Interstate Commerce Act. Principally, what was left out were those facilities under the broad definition of "railroad" and those services performed by independent companies. What was included was essentially the definition of "transportation" as it then appeared in the Interstate Commerce Act. *Compare* 45 U.S.C. §151, First, and former 49 U.S.C. §1(3).[32] App. A-56, A-57. The in-

---

31. *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 576 (1971). *See also Summit Airlines v. Teamsters Union No. 295*, 628 F.2d 798, 791 (2d Cir. 1981).

32. There are two differences between these provisions: "ventilation" is included only in the Interstate Commerce Act list while

corporated provisions of the Interstate Commerce Act refer only to those services incident to the transportation of property while it is being transported. Each of the services in the list concerns what is done to property once it is in the hands of the railroad; they are "terminal services" and services performed en route, and include the receiving, transporting, handling and delivering of property as well as its storage, refrigeration and icing.

As the legislative history makes clear, the definition in the RLA not only was lifted from, but was limited to, services "recognized by the Interstate Commerce Act." In construing a statute whose language was similarly drawn from another act, this Court has stated that there "is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged."[33] In a similar vein, the D.C. Circuit Court of Appeals stated that "[a]bsent evidence to the contrary words or phrases taken from prior legislation will be given the same meaning."[34] Thus, the Third Circuit Court of Appeals should have looked to cases interpreting the term "transportation" as it appeared in the Interstate Commerce Act.

The cases relating to the Interstate Commerce Act make it clear that "transportation" is limited to the move-

---

"transportation" appears only in the RLA list. The reason for the omission of "ventilation" from the RLA is not readily apparent but would seem irrelevant since Delpro does not perform ventilation services. "Transportation" would not appear in the list in the Interstate Commerce Act since these services were part of the definition of "transportation". The term was likely added to the list in the RLA since it did not appear elsewhere in the definitional sections of the RLA.

The definition of "transportation" in the Revised Interstate Commerce Act, 49 U.S.C. §10102(24)(B), is slightly different from the definition as it appeared in 1934. App. A-57. However, the changed definition was a result of the revision and codification of the act which was meant to be without substantive change. Revised Interstate Commerce Act, Title 49, U.S.C.A., p. iii.

33. *United States v. C.I.O.*, 335 U.S. 106, 112 (1947).

34. *United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974) (citation omitted).

ment of freight and to the provision of services at either end of the movement. In *Pennsylvania Railroad Co. v. Public Utilities Comm.*, 298 U.S. 170, 175 (1936), this Court stated that for the purposes of the Interstate Commerce Act, "transportation begins . . . when the merchandise has been placed in the possession of a carrier." Similarly, in *Southern Railway Co. v. Reid*, 222 U. S. 424, 440 (1912), this Court stated that transportation means the physical instrumentalities as well as services connected with the "receipt, delivery and handling of property transported." Both of these cases involved the transportation of property: the first concerned rates in switching certain carloads of coal, the second concerned a penalty for refusing to accept a tender of certain goods.

The limited definition of "transportation" found in the Interstate Commerce Act is to be expected since it was designed to regulate "the relations between carrier and shipper" as well as to secure "adequate nondiscriminatory transportation."[35] Delpro clearly does not provide any service which a carrier provides to a shipper and, therefore, does not provide any "transportation service" as defined in the Interstate Commerce Act.

The function test under the RLA must be limited in the same manner that "transportation" has been limited under the Interstate Commerce Act. Under such a limited definition, it is clear that Delpro is not a "carrier," and it is clear that in holding Delpro to be a "carrier" the Court of Appeals has ignored both the legislative history of the RLA and applicable decisions of this Court.

---

35. *Midstate Horticultural Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 361 (1943). *See also United States v. Baltimore & Ohio Railroad Co.*, 333 U.S. 169 (1947); *Consella v. Norfolk & Western Railway Co.*, 381 F.2d 473 (4th Cir. 1967).

IV. The Court of Appeals Decided an Important Question of Federal Law Contrary to the Congressional Purpose Discernible from the Face of the Statute.

A statute such as the RLA must be interpreted in light of the intent of Congress in passing the act.[36] The RLA on its face makes it clear that one of the main purposes of the statute was to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. §151a. It has long been recognized that the "almost interminable" process mandated by the RLA was designed to force agreements between employers and unions in order to prevent interruption of commerce.[37] It was thought that these procedures would stabilize labor relations and avoid the bloody conflicts which immediately preceded the passage of the RLA.[38]

The RLA was originally passed in 1926, a time when the federal government employed a policy of *laissez faire* with regard to labor relations. There was no law generally regulating labor relations until the NLRA was passed in 1936.[39] The RLA was designed to be limited in its application — limited to the "railroad world" and its essential adjuncts.[40] It is this limited purpose which led the Ninth Circuit Court of Appeals to hold: "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving."[41]

---

36. *Feaster, supra*, 410 F.2d at 1369.

37. *United Transportation Union v. Long Island Rail Road Company*, ____ U.S. ____, 50 L.W. 4315, 4318 (1982); *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969).

38. For a description of this conflict, see *United States v. Railway Employees' Dept. of the A.F. of L.*, 290 F. 978 (N.D. Ill. 1923).

39. Even the NLRA as originally enacted only regulated employer conduct. It was not until the Labor Management Relations Act of 1947, 61 Stat. 136 (June 23, 1947), that a comprehensive scheme of federal laws regarding labor relations was enacted.

40. *Feaster, supra*, 410 F.2d at 1369 (n. omitted.)

41. *Pan American, supra*, 324 F.2d at 220.

In *Jackson v. Northwest Airlines, supra*, the court ruled that the Fair Labor Standards Act ("FLSA")[42] was remedial in nature and that its exemption for those covered by the RLA needed to be strictly construed.[43] The court in *Pan American, supra*, noted that, like the FLSA, the NLRA was generally applicable with only the railroad industry having been carved out of its coverage. Thus, the court believed that the exemption in the NLRA must similarly be strictly read.[44]

The various courts which have focused on this limited scope of the RLA have looked at the relationship of the activity involved to the movement of persons and property.[45] The NMB, District Court and Court of Appeals in this case all assumed that the activities of Delpro's employees were essential to the continued transportation movement, and that an interruption in the services which Delpro provides would cause an interruption to commerce. Yet no detailed factual findings were made to see if this were truly the case.

Indeed it appears that a stoppage at Delpro would have little effect on the operations of the railroad carriers which allegedly control it. The types of repairs which Delpro performs require that the cars being worked on be out of service for a significant amount of time. (Running repairs are normally performed by the individual railroads.) Additionally, the repairs to be performed are scheduled on a ten year plan. App. A-18. Thus, it is clear that even if Delpro were shut down by a protracted strike there would be no immediate threat to the interstate movements of any railroads.[46]

---

42. 52 Stat. 1060 (June 25, 1938), as amended.

43. At the time, the FLSA contained an exemption similar to that found in the NLRA. This exemption no longer exists and the wage and hour standards of the FLSA are now generally applicable to all employers. 29 U.S.C. §203(d).

44. *Pan American, supra*, 324 F.2d at 223.

45. *Feaster, supra; Pan American, supra; Jackson, supra.*

46. The decision of this Court in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), cannot truly be read to the contrary. The case was decided in the District Court in 1935 be-

TTX has no contract with Delpro requiring the performance of any work by Delpro. App. A-18. In the event of a strike or other emergency, independent repair shops would be available to perform work that might otherwise be performed by Delpro. There is some doubt whether striking Delpro employees could picket independent repair shops given the NLRA's prohibition against secondary boycotts. 29 U.S.C. §158(b)(4). There is even more doubt whether the employees would be allowed to picket individual railroads.[47] Indeed, in this instance, the NLRA affords protection which might prevent interruptions in service better than the RLA. While the NLRA would prohibit secondary boycotts of the railroad carriers at any time, the RLA would not prohibit such secondary pressure once the mandatory mediation had taken place.[48] Additionally, if it appeared that a stoppage at Delpro was going to interrupt rail transportation, the President could invoke the emergency injunctive powers granted him under the NLRA (29 U.S.C. §§178, 179) as easily as he could under the RLA (45 U.S.C. §160).[49]

---

fore the Wagner Act was enacted. At the time this Court decided the case, it had not yet decided how broad the scope of the commerce power was. The court in *Pan American, supra*, 324 F.2d at 221-22, noted that the Supreme Court was

> dealing with a question, not of statutory interpretation, not of deciding whether one federal statute rather than another was applicable to these back-shop employees, but whether the federal Commerce Power was broad enough to permit Congress to regulate these back-shop labor relations at all . . . [A]t the time of the decision in Virginian it was necessary to show the substantial tangible relation between the back-shop work and the movement of trains in commerce, in order to satisfy the then existing requirements of constitutional doctrine.

47. *See generally*, Gorman, *Basic Text on Labor Law*, Ch. XII (1976).

48. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, *reh. denied*, 394 U.S. 1024 (1969).

49. The addition of these emergency powers under the NLRA is a further reason why the RLA does not need to read expansively.

Not only are the concerns that interruptions in service at Delpro would cause interruptions in carrier service unfounded, but these concerns are also irrelevant. The fact that a strike at Delpro could spread should not be the controlling factor in determining the application of the RLA. Such an interpretation would give the RLA almost unlimited scope.[50] This is clearly *not* intended by the statute. The RLA is meant to have a very limited scope — a scope limited to those operations whose interruption would cause an interruption in railroad transportation service. The Court of Appeals, by deciding that Delpro is a carrier subject to the RLA, has expanded the scope of the RLA contrary to the clear intent of the statute.

V. The Decision of the National Mediation Board Should Have Been Overruled for Failing to Clearly Set Forth the Grounds for its Departure from Prior Decisions.

The decision of the NMB that Delpro is a "carrier" is a departure from its previous holdings. This departure is clearly indicated in its denial of Delpro's Petition for Reconsideration when it held:

> To the extent that *Great Lakes* may be read to stand for the proposition tht [sic] the Board will not exercise jurisdiction over subsidiaries of carriers and over the subsidiaries' employees, the determination in *Great Lakes* is hereby overruled. Furthermore, the Board finds that *Eastern Aviation Services* is distinguishable from the instant case, in that EAS was not providing equipment or services integrally-related to the parent corporation's business. Delpro and TTX, on the other hand, perform work which is vital to the carriers' business.

App. A-32. Nowhere does the NMB set forth any reasons why *Great Lakes* must be overruled, or how the mainte-

---

50. *Jackson, supra,* 70 F. Supp. at 513.

nance services in *Eastern Aviation Services* are distinguishable from those provided by Delpro.

There does not appear to be any in-depth factual findings on whether the services provided by Delpro are vital to the continuation of any railroad carrier's business. Indeed, it appears that these services are not vital.[51] The NMB's only attempted explanation for its change in policy is that it "has undertaken an extensive evaluation of its jurisdictionai standards. Recent jurisdictional determinations of [the NMB] have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." App. A-31. However, the NMB does not set forth the results of its "extensive evaluation" nor the "changing corporate relationships" which have necessitated this change.

It is well settled that an administrative agency such as the NMB may depart from the norms and principles which it has previously set forth. But, as the Eleventh Circuit recently held in *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982):

> This does not mean, however, that an agency may abandon its own precedent without reason or explanation. 'An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.' *Mississippi Valley Gas Co. v. FERC*, 659 F.2d 488, 506 (5th Cir. 1981).

If an administrative agency is allowed to proceed without adequately explaining the basis of its actions, then the judicial review guaranteed by the Administrative Procedure Act[52] becomes meaningless. Thus, this Court has held:

> There is, then, at least a presumption that those [congressional] policies will be carried out best if the settled rule is adhered to. From this presumption

51. *See* discussion in Section IV, *supra*.
52. 5 U.S.C. §§704, 706 (2)(a).

> flows the agency's duty to explain its departure from prior norms. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied because it appears that a more discriminating invocation of the rule will best serve congressional policy . . . *Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action* . . .

Atchison, Topeke & Santa Fe Railway Co. v. Board of Trade, 412 U.S. 800, 808 (1973) (citation omitted) (emphasis added). Without such an explanation, the reviewing court cannot determine whether the agency's action was arbitrary or capricious.[53]

The decision by the NMB certainly does not adequately set forth the basis of its departure from prior decisions. Moreover, the District Court's finding that the NMB decision reflects consideration of the relevant factors is unsupported. There is no explanation as to why control must no longer be considered, or why various factors previously used to indicate control no longer need to be considered. Additionally, the NMB made no findings as to whether the services which Delpro provides are essential to the continuous operations of any railroad carriers. Indeed, if the NMB had considered the relevant factors, it would have had to determine that Delpro does not meet the function test and is not a "carrier."[54] Since the NMB did not adequately set forth the basis of its decision or the reason for its departure from prior decisions, the District Court and the Court of Appeals improperly affirmed its findings. Therefore, the decisions of those courts must be reversed.

---

53. *McHenry, supra*, 668 F.2d at 1193.
54. *See* discussions in Sections I-IV, *Supra*.

CONCLUSION

For all of the reasons set forth above, Petitioner Delpro Company respectfully requests that a writ of certiorari be issued to review and to reverse the Judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

WILLIAM P. QUINN
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19107
215-925-8300
Attorney for Petitioner

Of Counsel:

DAVID F. GIRARD-DICARLO
ERIC M. HOCKY
RUBIN, QUINN, MOSS AND GIRARD-DICARLO

Date: August 12, 1982